# STATE OF MICHIGAN

# COURT OF APPEALS

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| STATE OF MICHIGAN, DEPARTMENT OF CONSUMER & INDUSTRY SERVICES,<br><br>Petitioner-Appellee, | UNPUBLISHED<br>August 22, 2000 |
| v | No. 213602<br>Board of Nursing Disciplinary Subcommittee |
| BETH ANNE KELLEY, L.P.N., a/k/a BETH KELLY,<br><br>Respondent-Appellant. | LC No. 96-000625 |

Before: White, P.J., and Talbot and R. J. Danhof*, JJ.

PER CURIAM.

Respondent appeals as of right from a decision of the Board of Nursing Disciplinary Subcommittee of the Department of Consumer & Industry Services suspending respondent's nursing license for ninety days for violation of the standard of care pursuant to MCL 333.16221(a); MSA 14.15(16221)(a), and MCL 333.16221(b)(i); MSA 14.15(16221)(b)(i). We affirm.

Respondent first argues on appeal that the Administrative Law Judge (ALJ) erred in denying respondent's motion for dismissal based on the failure to complete the disciplinary proceedings within one year as required under MCL 333.16237(5); MSA 14.15(16237)(5). We disagree. Section 16237(5) of the Public Health Code, which governs occupational disciplinary proceedings provides:

> The compliance conference, the hearing before the hearings examiner, and final disciplinary subcommittee action shall be completed within 1 year after the department initiates an investigation under section 16231(2) or (3). The department shall note in its annual report any exceptions to the 1-year requirement. [MCL 333.16237(5); MSA 14.15(16237)(5).]

Here, a total of nineteen months had transpired at the time of respondent's motion for dismissal, including nine months attributable to stays entered by the ALJ for settlement

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

negotiations. An additional seven months transpired before the disciplinary subcommittee entered its final order. Respondent argues that the state failed to complete the disciplinary process in the required one-year limit and, therefore, dismissal was required. Petitioner argues that the statute's only remedy for violation of the one-year time limit is a notation in the annual report, not dismissal. Questions of statutory interpretation are questions of law that we review de novo on appeal. *Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

Although no Michigan appellate court has directly interpreted the time limit of MCL 333.16237(5); MSA 14.15(16237)(5), we find *Dep't of Consumer & Industry Services v Greenberg*, 231 Mich App 466; 586 NW2d 560 (1998), to be instructive. In *Greenberg*, this Court found that a disciplinary subcommittee's failure to meet and impose a penalty on the respondent within sixty days as required by statute did not mandate dismissal. *Id*. at 469. Pursuant to MCL 333.16232(3); MSA 14.15(16232)(3), a subcommittee is required to meet within sixty days after receiving the hearing referee's proposal for decision. The *Greenberg* Court, noting that the statute did not expressly provide for dismissal as a remedy to the sixty-day violation, explained:

> The lack of sanction leads us to believe that the time frames set out and relied on by appellant are primarily guidelines for the disciplinary system at issue here. Although the use of "shall" usually indicates a mandatory requirement, other statutory language and legislative intent indicate that "shall" in this instance is permissive. Although other provisions of the Public Health Code, 1978 PA 368, MCL 333.1101 *et seq.*; MSA 14.15(1101) *et seq*., impose a time frame for disciplinary complaint processing, none of the provisions provide for dismissal based on a violation of the deadlines. MCL 333.16241(8)(e); MSA 14.15(16241)(8)(e) explicitly contemplates that delays will occur within the various stages of the disciplinary process. [*Id*. at 468-469. Citations omitted.]

Here, § 16237(5) does not provide for a specific remedy when the one-year time limit is violated, but rather only requires that exceptions to the one-year requirement be noted in the department's annual report. Given that the statutory language of § 16237(5) is similar to that examined by this Court in *Greenberg*, and, as in *Greenberg*, the legislature has not mandated a remedy, we conclude that dismissal is not the automatic remedy for noncompliance with the one-year time limit.[1] Accordingly, respondent's motion for dismissal was properly denied.

Respondent next argues that the ALJ inappropriately shifted the burden of proof to her when the ALJ indicated in his proposal for decision that he did not find credible respondent's argument that the shower incident was exaggerated because respondent failed to support her claim by offering into

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[1] Nor have we found any specific time limit or sanction for violation of the § 16237(5) time limit in the applicable promulgated agency rules governing disciplinary hearings, see 1996 AACS R 338.1601 *et seq.*, or in the applicable provisions of the Administrative Procedures Act governing licensing, see MCL 24.291 *et seq.*; MSA 3.560(191) *et seq*.

evidence the original incident report or the testimony of the director of nursing. We find no merit to this argument. Respondent's primary defense to the charges was that petitioner's witnesses were part of a clique at the nursing home who fabricated or exaggerated their claims against respondent because they did not like her and wanted to get rid of her. Part of respondent's supporting argument was that if an incident report had been submitted to the director of nursing regarding the incident, as described by one witness, then some type of disciplinary action would have been taken, but none was in fact taken. Respondent did not support her version of events with evidence other than her own testimony. The ALJ's finding that respondent's theory was not credible did not have the effect of shifting the burden of persuasion to respondent, but rather only imposed on the respondent the burden of production of some evidence to support her defense theory. See *Michigan Tractor and Machinery Co v Elsey*, 216 Mich App 94, 102-103; 549 NW2d 27 (1996). We find no error.

Respondent next argues that the decision of the disciplinary subcommittee was not supported by competent evidence. In this context, respondent also argues that the ALJ exhibited a predisposition against her in his proposal for decision by discrediting her testimony in part because her self-interest was at stake, and in crediting the testimony of certain other witnesses without evaluating their possible motivation to lie or to exaggerate the incidents.[2] The ALJ found that respondent's alleged violations of the standard of care were proven by a preponderance of the evidence, as required by 1996 AACS R 338.1624(1), which provides that "the complaining party shall have the burden of proving, by a preponderance of the evidence, that grounds exist for the imposition of a sanction on a license, registrant, or applicant." The disciplinary subcommittee adopted the ALJ's findings of fact and conclusions of law and ordered respondent's nursing license suspended for ninety days. We review an administrative agency's final decision to determine whether it was authorized by law and supported by competent, material, and substantial evidence on the whole record. MCL 24.306(1); MSA 3.560(206)(1); *Cogan v Bd of Osteopathic Medicine & Surgery*, 200 Mich App 467, 469; 505 NW2d 1 (1993). The substantial evidence test requires that a decision be supported by evidence that a reasonable person would accept as sufficient. *Id*. at 470. After reviewing the record in this case, we are persuaded that the disciplinary subcommittee's decision was supported by sufficient evidence, and that the record does not support respondent's allegation of bias or predisposition.

The ALJ found credible the testimony of petitioner's witnesses regarding the shower incident and the naso-gastric tube incident. In light of the ALJ's opportunity to hear the testimony and view the witnesses, we accord great deference to his factual findings and credibility determinations, which were adopted by the disciplinary subcommittee. *Arndt v Dep't of Licensing & Regulation*, 147 Mich App 97, 101; 383 NW2d 136 (1985). As an appellate court, our function is not to resolve conflicts in the evidence or to pass on the credibility of the witnesses. *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992). Accordingly, we

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[2] To the extent that respondent seeks disqualification of the ALJ on this basis, we find that the issue has not been properly preserved for appellate review. See MCR 2.003(C)(3); *Homestead Development Co v Holly Township*, 178 Mich App 239, 248; 443 NW2d 385 (1989).

find that the decision of the disciplinary subcommittee, which adopted the ALJ's proposal for decision, was supported by competent, material, and substantial evidence on the whole record.

Affirmed.

/s/ Helene N. White
/s/ Michael J. Talbot
/s/ Robert J. Danhof